

# Sunshine Week: Selected Issues for Congress

March 13, 2020

Coinciding with former President James Madison’s birthday, Sunshine Week recognizes the importance of transparency in government operations, and the work of Freedom of Information Act (FOIA; [5 U.S.C. §552](#)) professionals across the federal government. Considered a defender of open government, [Madison wrote](#), “A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own Governors, must arm themselves with the power, which knowledge gives.”

Recognition of the people’s right to know what their government is doing through access to government information can be traced back to the [early days](#) of the nation; however, modern statutes provide guidance on how the public may access government information. One critical statute, which is celebrated alongside Madison’s legacy during Sunshine Week, is FOIA. This Insight provides a brief summary of FOIA and its administration, and then provides an overview of selected issues relating to FOIA that may be of interest to Congress.

## The Freedom of Information Act

The Freedom of Information Act established a statutory presumption of public access to information held by executive branch agencies. Enacted in 1966, FOIA generally [allows any person](#)—individual or corporate, U.S. citizen or not—to request and obtain, without explanation or justification, existing and identifiable agency records on any topic. Under FOIA, the [burden of proof](#) to access government information shifted from a requester’s “need to know” to a “right to know” doctrine. FOIA includes a series of exemptions from disclosure of certain categories of information. Since 2016, agencies may not withhold information under one of the statute’s nine exemptions, unless the disclosure would violate the law or the agency reasonably [foresees that disclosure would harm](#) an interest covered by an exemption.

FOIA is a tool of inquiry and information gathering for various individuals and sectors—including the media, businesses, scholars, attorneys, consumers, and activists. Agency responses to FOIA requests may involve a few sheets of paper, several stacks of records, or information in an electronic format. Assembling responses requires staff time to search for records and make duplicates, among other resource commitments. Agency information management professionals are responsible for efficiently and economically responding to, or denying, FOIA requests.

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Congress may be interested in improving the administration of FOIA in light of the persistent backlog of requests, the variety of offices managing FOIA requests, and the use of FOIA's exemptions to withhold information.

## Backlog of FOIA Requests

The backlog of requests received by agencies that have not yet been completed continues to increase; in FY2018, the [number of backlogged requests](#) stood at 130,718 requests, up 17% from FY2017 (111,344 requests). Data for FY2019 are not yet available. The Department of Homeland Security, Department of Justice, and Department of Defense have the highest number of backlogged requests; however, these three agencies also receive the largest number of requests government-wide.

Congress may consider policies that would target improving the FOIA backlog at particular agencies, or a broader multiagency approach. [Some proposals](#) include introducing FOIA measurements into employee performance reviews, centralizing FOIA request processing, or contracting surge support staff to assist.

## Variety of FOIA Officers

The [Chief FOIA Officer](#) (5 U.S.C. §552(j)) is responsible for ensuring efficient and appropriate agencywide compliance with the statute, and may administratively report to other agency officials in different ways. While statute specifies that the [Chief FOIA Officer](#) shall be an Assistant Secretary or equivalent within an agency, it is common for the person serving in the role to split his or her duties with another Assistant Secretary role. For example, the Chief FOIA Officer may also serve as the agency's Chief Privacy or Management Officer, Assistant Secretary for Public Affairs, or General Counsel. This variety of duties for an agency Chief FOIA Officer also reflects the variety of reporting mechanisms on FOIA policy to the agency, and may pose an obstacle to centralizing FOIA request processing. In some agencies, the Chief FOIA Officer might report directly to the agency head, while in others, the officer might be several steps removed from the agency head.

## Use of FOIA Exemptions

While FOIA's main purpose is to provide the public with a means of gaining access to information on federal government operations, the federal government may use one of the statute's nine exemptions to prevent the disclosure of information. The exemptions cover information as varied as national security secrets to geological information concerning wells. Congress may be interested in determining whether there are trends in exemption usage, and if the exemptions are being properly applied by agencies.

Per FY2018 data, [Exemptions 6, 7\(C\), and 7\(E\)](#) were most commonly cited in withholding information. Generally, Exemptions 6 and 7(C) apply to certain information whose disclosure would or could reasonably be expected to interfere with personal privacy, and Exemption 7(E) applies to law enforcement techniques, guidelines, and procedures.

Notably, the Supreme Court issued a 2019 [Exemption 4](#) decision in *FMI v. Argus Leader Media* related to the disclosure of confidential commercial or financial information. The Court's decision to more broadly interpret Exemption 4 likely permits agencies to withhold a larger category of private-sector information from FOIA's disclosure mandate. The more expansive interpretation of Exemption 4's scope could see a corresponding decrease in the public disclosure of information protected by that exemption. However, it may also make some private entities more willing to supply commercial and financial information to the government.

## Selected CRS Resources

- CRS In Focus IF11450, *The Freedom of Information Act: An Introduction*, by Daniel J. Sheffner;
- CRS Report R46238, *The Freedom of Information Act (FOIA): A Legal Overview*, by Daniel J. Sheffner;
- CRS Report R41933, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues*, by Meghan M. Stuessy;
- CRS In Focus IF11272, *Freedom of Information Act Fees for Government Information*, by Meghan M. Stuessy; and
- CRS In Focus IF11119, *Federal Records: Types and Treatments*, by Meghan M. Stuessy.

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